

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

10,972

FILE: B-194989

DATE: August 8, 1979

MATTER OF: Esther Prosser - [Claim for Retroactive Promotion
and Backpay]

DIGEST: Employee's transfer between district offices caused her to receive career-ladder promotion 1 month later than date she first became eligible. Promotion may not be made retroactive since proper authorizing official had not exercised discretion to promote. See Douglas C. Butler, 58 Comp. Gen. 51 (1978). Furthermore, failure to promote on the earlier date did not violate nondiscretionary agency policy or negotiated agreement. See John Cahill, 58 Comp. Gen. 59 (1978).

This decision is in response to the request from Mr. George J. Schuette, Union Representative, National Federation of Federal Employees, Local 75, concerning the entitlement of Ms. Esther Prosser, an employee of the Social Security Administration, to a retroactive promotion and backpay. Ms. Prosser's career-ladder promotion was delayed 1 month due to an administrative oversight, and the question presented for our decision is whether her promotion may be made retroactively effective.

Ms. Prosser was employed as a Claims Representative Trainee, grade GS-5, in the Social Security Administration Branch Office in Batavia, Ohio, and she was transferred on January 28, 1979, to the Cincinnati District Office. The Batavia office prepared the necessary documents for her within-grade increase which was made effective on February 11, 1979, but that office apparently did not prepare documents for her career-ladder promotion to grade GS-7. When Ms. Prosser realized her promotion had not been approved, she so advised the District Manager in the Cincinnati office who promptly requested her promotion to grade GS-7. The request was received in the Regional Personnel Branch Office on March 22, 1979, and was made effective on March 25, 1979.

The union letter states that Ms. Prosser was eligible for promotion effective February 25, 1979, and that under the negotiated agreement between the union and the Cincinnati office, her promotion was required on that date. The union argues that the Cincinnati office failed to "timely consider" Ms. Prosser for promotion as required under Article 16.3(h) of the negotiated agreement, and that but for this violation she would have been promoted on February 25, 1979.

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The agency denied Ms. Prosser's request for a retroactive promotion on the basis that the delay in her promotion was not due to "administrative error" as defined by our Office. The agency admits that Ms. Prosser could have been promoted on February 25, 1979, since she met the experience and time-in-grade requirements for promotion to grade GS-7 at that time. However, the agency argues that the delay occurred prior to receipt of the request for promotion (SF-52) in the Regional Personnel Branch Office, the office with authority to approve promotions, and, therefore, does not constitute "administrative error." As to the negotiated agreement provision, the agency states that the language is not so specific as to mandate a promotion within a set time frame.

Our decisions have held that, as a general rule, a personnel action may not be made retroactive so as to increase the rights of an employee to compensation. We have made exceptions to this rule where administrative or clerical error (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation. See Douglas C. Butler, 58 Comp. Gen. 51 (1978), and decisions cited therein.

As we stated in Butler, supra, with respect to delays or omissions in the processing of promotion requests that will be regarded as administrative or clerical errors which will support a retroactive promotion, our decisions have drawn a distinction between those errors that occur prior to promotion approval by the properly authorized official and those errors that occur after such approval but before the acts necessary to effective promotions have been fully carried out. Thus, where the delay or omission occurs before that official has had the opportunity to exercise his discretion with respect to approval or disapproval, administrative intent to promote at any particular time cannot be established other than by after-the-fact statements as to what that official states would have been his determination. On the other hand, after the authorized official has exercised his authority by approving the promotion request, all that remains to effectuate that promotion is a series of ministerial acts which could be compelled by writ of mandamus. Hence, administrative or clerical errors occurring after such approval do come within the exceptions outlined above so as to permit a retroactive promotion. See John Cahill, 58 Comp. Gen. 59 (1978); and Janice Levy, B-190408, December 21, 1977.

In the present case, it appears clear that the delay in processing Ms. Prosser's promotion occurred before the promotion request was forwarded to the authorized official. Therefore, the delay would not constitute an administrative error as described above.

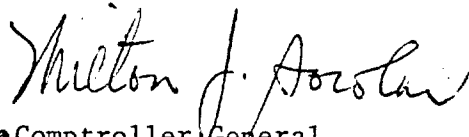
Our Office has also held that an agency, by negotiation of a collective bargaining agreement, may bargain away its discretion to promote and thereby make a provision of a negotiated agreement into a nondiscretionary agency policy. John Cahill, supra, 58 Comp. Gen. 59 at 61-62, and decisions cited therein. Under those circumstances, the violation of a mandatory provision in a negotiated agreement which causes the employee to lose pay, allowances, or differentials may constitute an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596, and may entitle the employee to retroactive compensation for such violation of the negotiated agreement. See Cahill, supra, 58 id. 59, at 62.

In the present case, the union argues that the applicable negotiated agreement required Ms. Prosser's promotion on the date she first became eligible. The agreement provides, in Article 16.3(h), as follows:

"Management agrees where possible to timely consider the promotion of employees when they are first eligible."

However, we believe this language does not require a promotion within any prescribed time frame or in accordance with any stated conditions or criteria. This case is clearly distinguishable from our prior decisions where the agency has agreed to promote on an ascertainable date under stated conditions. See 55 Comp. Gen. 42 (1975); 54 id. 888 (1975); 54 id. 403 (1974); and B-180010, August 30, 1976.

Thus, in the absence of a violation of a nondiscretionary agency policy, regulation, or collective-bargaining provision, we hold that Ms. Prosser is not entitled to a retroactive promotion and backpay.



For the Comptroller General
of the United States